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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~859~~

ISTHMIAN LINES, INC.
AND
JARKA CORPORATION OF BALTIMORE, *Petitioners,*
V.
WILLIAM BALLWANZ, TO THE USE OF LIBERTY MUTUAL INSURANCE COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. _____

ISTHMIAN LINES, INC.
AND
JARKA CORPORATION OF BALTIMORE, *Petitioners*,

v.

WILLIAM BALLWANZ, TO THE USE OF LIBERTY MUTUAL INSURANCE COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Isthmian Lines, Inc. (Isthmian) and Jarka Corporation of Baltimore (Jarka) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on June 5, 1963; a timely motion for rehearing (Record, page 21) was denied on January 8, 1964 (Appendix C, page 12a).

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix A, page 1a) is reported in 319 F. 2d 457.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1). The judgment sought to be reviewed was entered on June 5, 1963 (Appendix B, page 11a). An order denying a motion for rehearing was entered on January 8, 1964 (Appendix C, page 12a).

QUESTIONS PRESENTED

1. Is the vessel owner negligent if (a) he fails to inspect stevedore gear before cargo operations begin and (b) he fails to supervise an independent contractor as to instrumentalities adopted and methods used?

2. May a vessel owner be held liable to an injured longshoreman when the sole cause of the injury was the negligence of the longshoreman's employer, an independent stevedoring contractor?

3. Should the verdict of the jury have been set aside by the Court below when the jury's answers to special interrogatories were consistent in every way with its verdict?

STATEMENT OF THE CASE

William Ballwanz is a longshoreman who at the time of his injury on April 25, 1960, at approximately 10:15 P.M., was employed by Jarka, an independent stevedoring contractor which had been engaged to perform stevedoring services on board the SS STEEL WORKER, owned by Isthmian.

The jurisdiction of the District Court was based upon diversity of citizenship as Ballwanz was a citizen of Maryland and Isthmian is a Delaware corporation. 28 U.S.C.A. §1332(a)(1).

The respondent was one of a gang of eight men engaged in loading a cargo of truck bodies into #5 'tween deck of

the STEEL WORKER. The truck bodies were crated in wooden frames measuring between 30 and 35 feet in length, eight feet in width and four to four and one-half feet in height. In order to lift them from the pier into the hold, a heavy wire sling was placed under each end of the crate approximately eight feet from the edge. A wooden spreader was placed between the wires of the sling at the top of the crate to prevent the weight of the body exerted on the heavy metal wire from crushing in the crate at the top. The spreaders were four by sixes, eight feet long, made of oak, the ends of which were notched to prevent the wires from slipping off. When the crates were landed on four-by-fours placed in the square of the hatch to receive them, the sling would be relieved of its weight and the spreaders would drop down onto the top of the crate. The longshoremen would then remove the slack wire cable from the respective ends of the crate and take a half hitch with the wire sling around each end of the spreaders. This was done on instructions relayed to them from the vessel's weather deck by the Jarka foreman or gang carrier. The winches, operated by Jarka employees, would then hoist the wire slings with the spreaders in them out of the hold and proceed to pick up another crate. After this had been done three or four times, one of the spreaders slid out as the sling was being hoisted from the tween deck and fell back into the hold striking the respondent on the leg and injuring him.

The entire operation was run by Jarka. The wires and sling in question were owned and brought on board the vessel by Jarka. The spreaders were supplied by the shipper of the cargo and the Jarka foreman looked at them before they were put in use, considered them perfectly adequate spreaders or he would not have used them. He had used such spreaders before and he testified that they are

satisfactory. He in fact inspected the spreader in question before it was used and thought it was "okay". He found no defects in it. An examination of the spreader after the accident revealed that it was all right. No complaints were made to the stevedore foreman concerning the spreaders during the course of the loading operation.

The respondent himself, together with another longshoreman, had secured the spreader which fell and injured him. He did not complain to the foreman about the spreader. Rope for securing the spreaders was available in the Jarka gear shed and it was standard procedure for the longshoremen to ask the Jarka gear man for such rope if it was desired, but no such request was made.

The respondent could have been safe from the falling spreader by walking a distance of nine feet. The longshoremen working the holds were expected to stand out of the way.

There was no evidence that any officer of the vessel knew what type of spreader was being used or how the spreaders were being secured in the sling to be raised out of the hold.

The case was submitted to the jury on special interrogatories which were answered as follows:

A. Under all the facts of this case, was the SS STEEL WORKER, at the time and place of the casualty complained of, unseaworthy with respect to the loading gear used at the No. 5 hatch?

Yes ____ No. X

B. Under all the facts of this case, was Isthmian Lines, Inc., the Master, or any member of the crew of the SS STEEL WORKER at the time and place of the casualty complained of, negligent?

Yes. X ____ No ____

If your answer to both A and B are "No", it is not necessary to answer the remaining questions.

If your answer to either A or B is "Yes", you should answer the remaining questions.

C. If you find unseaworthiness or negligence, or both, existed at the time and place of the casualty complained of, was such unseaworthiness or negligence, or the combination of both, a proximate cause of the injuries sustained by Mr. Ballwanz?

Yes . No. X

D. Did the negligence of the Plaintiff cause or contribute to the accident of which he complains?

Yes. X No

E. If you find negligence on the part of Mr. Ballwanz and that such negligence was a proximate cause of the injuries sustained, to what extent or degree, percentagewise, did such negligence contribute to the happening of the casualty?

50%

F. If your answer to either question A or B and your answer to question C were "Yes", at what amount do you fix damages, apart from any question of contributory negligence.

$

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Fourth Circuit is in direct conflict with decisions of other United States Courts of Appeal and with its own prior decisions.

2. The United States Court of Appeals for the Fourth Circuit has decided important questions of federal law which have not been, but should be settled by this Court.

3. The United States Court of Appeals for the Fourth Circuit refused to follow a prior decision of this Court.

In the opinion below (Appendix A, page 4a), Judge Bell stated:

> "If the ship was negligent, that negligence consisted of its failure to prohibit the inadequate equipment from being used, or if it was being used improperly then to stop such improper use."

This portion of the Court's decision is based on three principles. All are directly in conflict with the decisions of the Second Circuit; two with the decisions of the Third Circuit; one with the decisions of the First, Fifth and Ninth Circuits; and all with its own prior decisions.

The first of these principles is:

1. THE VESSEL OWNER IS NEGLIGENT FOR FAILING TO INSPECT EQUIPMENT BROUGHT ON BOARD BY AN INDEPENDENT STEVEDORING COMPANY.

The Second Circuit decisions to the contrary are:

United States v. Bull Steamship Line, 146 F. Supp. 210 (S.D.N.Y. 1956), aff'd 274 F. 2d 877 (2d Cir. 1960);

Oblatore v. United States, 289 F. 2d 400 (2d Cir. 1961), cert. den. 368 U.S. 881 (1961);

Gallagher v. United States Lines Co., 206 F. 2d 177 (2d Cir. 1963);

Signore v. The Ferngulf, et al., 103 F. Supp. 677 (S.D.N.Y. 1952).

In *United States v. Bull Steamship Line, supra*, the vessel owner sued the stevedoring company for damage to the vessel allegedly resulting from the stevedore's negligence in loading. The Court said at page 214 of 146 F. Supp.:

> "Respondent (stevedore) contends that libelant (vessel owner) is guilty of contributory negligence because libelant did not direct the loading in a manner to prevent damage. This can not be sustained because by the express terms of the contract respondent was an

independent contractor and, libelant accordingly, had no duty or right of supervision as to instrumentalities adopted and methods used.' The Richelieu, 4 Cir., 48 F. 2d 497, 502."

The Fourth Circuit decisions to the contrary are:

Cornec v. Baltimore & O. R. Co. (The Richelieu) 48 F. 2d 497 (4th C.C.A. 1931), cert. den. 284 U.S. 621 (1931);

Fox v. Mormacwind, 182 F. Supp. 7 (E.D. Va. 1960), aff'd 285 F. 2d 222 (4th Cir. 1960).

At page 11 of 182 F. Supp. the Court said:

"There is no merit to the contention that the shipowner was negligent. Libellant insists that the ship's officers and crew were under a duty to inspect all equipment brought aboard the vessel by Waterfront, and that this remained a continuing duty during the performance of the work by Waterfront. If a shipowner is under such a duty, it would become a guarantor of the safety of all equipment brought aboard by a competent independent contractor. This concept is foreign to the ordinary principles of negligence."

The second of these principles is:

2. THE VESSEL OWNER IS NEGLIGENT FOR FAILING TO SUPERVISE THE LOADING BY AN INDEPENDENT STEVEDORING COMPANY.

The Second Circuit cases to the contrary are:

United States v. Bull Steamship Line, *supra*;
Oblatore v. United States, *supra*;
Gallagher v. United States Lines Co., *supra*;
The Persian Monarch, 55 Fed. 233 (2d C.C.A. 1893);
Sigmore v. The Ferngulf, *et al.*, *supra*.

A very lucid explanation of the functions of ship's officers during the performance of cargo operations by an independent stevedoring contractor is given in the district court

opinion of *Signore v. The Ferngulf, et al., supra*, at page 678:

> "True, as the libelant urges, there are ship's officers on board to perform certain supervisory functions, but these functions primarily involve the duty of seeing that no injury is done to the cargo, for the officers have responsibility to the cargo to make certain that it is properly stowed. The reason for this is that they are charged with the duty of having the cargo properly secured while the ship is in passage.
>
> "They are further interested in seeing that no injury is done to the ship itself in the loading and unloading processes. This, however, is a far cry from any conclusion to the effect that they are charged with the obligation of supervising the loading of each draft of dunnage, or that they may be charged with the negligence of the stevedoring company, if there was such negligence, in using and securing this rope sling. Such a contention is singularly empty when, as here, none of the ship's personnel had any actual knowledge that that was an improper method of rigging the sling.
>
> "See Lauro v. U. S., 2 Cir., 162 F. 2d 32; Riley v. Agwilines, Inc., 296 N.Y. 402, at page 407, 73 N.E. 2d 718, at page 720. In the latter case the Court stated: 'The maritime law imposes no liability upon a vessel or its owner when a longshoreman employed by a stevedoring corporation engaged in loading or discharging the vessel is injured because of the manner in which the longshoremen carry on the work or because of their failure to use appliances furnished for their use * * *'. See also Atlantic Transport v. State of Maryland, 4 Cir., 259 F. 23."

The Third Circuit cases to the contrary are:

Curtis v. A. Garcia Y Cia., Ltda., 272 F. 2d 235 (3rd Cir. 1959);

Knox v. United States Lines Co., 294 F. 2d 354 (3rd Cir. 1961), where the Court said at page 357:

"As our decision in the Brabazon case indicates, the law does not impose a duty upon a ship to provide continuing observation and immediate supervision of work being done by a qualified independent contractor in unloading ordinary cargo."

The Court continued at page 358:

"The physical handling of an ordinary bale or bundle is the clearest example of a detail within the special competence and peculiar responsibility of the stevedoring contractor. There was no reason to believe that the longshoremen would not proceed properly and carefully in removing the bundle in question. * * *"

The Fourth Circuit cases to the contrary are:

Cornec v. Baltimore & O. R. Co. (The Richelieu) *supra;*
Fox v. Mormacwind, supra;
Atlantic Transport Company v. State of Maryland, 259 Fed. 23 (4th C.C.A. 1919).

The third of these principles is:

3. A VESSEL OWNER IS LIABLE TO A LONGSHOREMAN FOR AN INJURY CAUSED SOLELY BY THE NEGLIGENCE OF A FELLOW LONGSHOREMAN.

As the jury found that Ballwanz was 50% negligent and that Isthmian's negligence was not a proximate cause of the accident, the other negligent person must have been Haines, the longshoreman who secured one end of the spreader in the sling while Ballwanz was securing his end. Thus the Court below held the ship liable for the negligence of the longshoremen. This holding is contrary to *every** reported decision on the point.

* Except, apparently, the latest maritime tort case emanating from the Fourth Circuit, *Scott v. Ishrandtsen Company, Inc.* (decided January 13, 1964), which just came to petitioners' attention as this petition went to press.

A first Circuit decision to the contrary is:

Arena v. Luckenback Steamship Co., 279 F. 2d 186 (1st Cir. 1960), cert. den. 364 U.S. 895 (1960).

Second Circuit decisions to the contrary are:

Berti v. Compagnie De Navigation Cyprien Fabre, 213 F. 2d 397 (2d Cir. 1954);

Puddu v. Royal Netherlands Steamship Co., 303 F. 2d 752 (2d Cir. 1962).

In *Berti, supra*, the Court said at page 400:

"We are clear that since control of the details of the operation was left to American (stevedore), Cyprien (shipowner) cannot be held for negligence in the latter's performance. * * * If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien."

Fourth Circuit cases to the contrary are:

Blankenship v. Ellerman's Wilson Line New York, Inc., 265 F. 2d 455 (4th Cir. 1959);

Edwards v. Steinns, 207 F. 2d 734 (4th Cir. 1953).

A Fifth Circuit decision to the contrary is:

Firemen's Fund Indemnity Co. v. United States, 211 F. 2d 773 (5th Cir. 1954), cert den. 348 U.S. 855 (1954). The Court held at page 777 of 211 F. 2d.

"As the sole proximate cause of the injuries here was the negligence of the contracting stevedores, and as unseaworthiness of the vessel has not been established, the United States is not liable."

Ninth Circuit cases to the contrary are:

Billeci v. United States, 298 F. 2d 703 (9th Cir. 1962);

Ratwson v. Calmar Steamship Corp., 304 F. 2d 202 (9th Cir. 1962);
Titus v. The Santorini, 258 F. 2d 352 (9th Cir. 1958).

Jury Verdict Set Aside

The Court below, in setting aside the jury's verdict on the ground that its answers to special interrogatories were irreconcilable, refused to follow the decision of this Court in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962). This Court said at page 364:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment."

The Court of Appeals found it impossible to reconcile the jury's finding that the respondent was 50% negligent, and Isthmian was also negligent, with the jury's further finding that Isthmian's negligence was not a proximate cause of the accident. The Court felt Isthmian must have been found by the jury to be guilty of the remaining 50% of the negligence which caused the accident. As indicated above, the jury must have found Haines, his fellow workman, to be the other 50% negligent person as he secured one end of the spreader in the sling while Ballwanz secured the other end. Obviously, the jury considered each man to have been equally to blame for the spreader's not being fastened securely in the sling and consequently falling out and *striking* Ballwanz. Any inconsistency there may appear to be in the jury's answers to the questions submitted to it disappears when the case is viewed as one in which the jury decided the accident was due 50% to the respondent's negligence and 50% to the negligence of his fellow long-

shoreman, Haines; therefore, whatever negligence the jury found on the part of Isthmian, it correctly concluded was not a proximate cause of the accident.

Contributory Negligence

With reference to contributory negligence, the Court used the following novel language:

> "The plaintiff longshoreman was at the bottom of the hierarchy of command and we fail to see how he can be held responsible for the manner of operations of the stevedoring company." (Appendix A, page 5a.)
>
> "The plaintiff in this case was at the very bottom of the hierarchy of command, and the effect of the charge was to place too much responsibility upon him for the over-all operations of the stevedore." (Appendix A, page 9a.)

The mere fact that the respondent may have been doing his job in a sloppy, haphazard manner for a long period of time, does not alter the fact that it was poorly done in the first place; nor was the Court justified in characterizing it as a method adopted by the stevedore for which the respondent should not be held responsible. Can it seriously be contended that anyone has the duty to continue to watch a longshoreman hammering nails to see that he does not hold the nail improperly? Or that if he has been hammering nails improperly for an hour or so it was a method adopted by the stevedore for which the longshoreman cannot be held to blame?

Here, the jury found Ballwanz 50% responsible for the manner in which he performed his job; the Court below substituted its opinion for the jury's and concluded that the jury was wrong.

Even seamen, the proverbial wards of the admiralty, are required to exercise some care for their own safety. In

Larsson v. U. S. A., 1950 A.M.C. 176 (N.D., Calif. 1949), *aff'd sub nom. Larsson v. The Coastwise (Pacific Far East) Line*, 181 F. 2d 6 (9th Cir. 1950), cert. den. 340 U.S. 833 (1950), the Court said at page 178 of 1950 A.M.C.:

> "While seamen are considered wards of the court and justifiably are entitled to special consideration insofar as being given a safe place to work, shipping companies are not absolute insurers. *It is not incumbent upon them to treat seamen as if they were in swaddling clothes and incapable of using a modicum of care for their own safety.*" (Emphasis supplied.)

And Judge Archie O. Dawson, of the Southern District of New York, held in *Colombo v. The Texas Co.*, 140 F. Supp. 496, 498 (S.D.N.Y. 1956):

> "The Jones Act does not repeal the laws of common sense, nor does it mean that seamen are to be treated as infants in the work assigned to them."

In *Smith v. Austin Lifts, Ltd., et al.* (1959): 1 Weekly L.R. 100, Viscount Simonds said rather succinctly at page 105:

> "I turn, then, to the first respondents, the employers. Here I have greater difficulty. It was their duty to see that the place at which their workmen were to work was reasonably safe. That is a generalization which can only be applied after a consideration of what is, in all the circumstances, reasonable and it is, I think, always important to bear in mind a principle emphasized in Winter v. Cardiff Rural District Council (1950) 1 All E.R. 819 that *there is a sphere in which it is reasonable to leave to a skilled workman the decision whether the difficulty that he encounters is one in which he needs help. I deprecate any tendency to treat the relation of employer and skilled workman as equivalent to that of a nurse and imbecile child.*" (Emphasis supplied.)

Absence of Complaints

Your petitioners cannot refrain from calling to the Court's attention that, contrary to the view expressed by the Court below, while complaints to the ship by longshoremen are not significant in determining whether the ship was unseaworthy, nevertheless, it is obvious that in determining whether or not an unseaworthy condition existed, complaints of the longshoremen among themselves are certainly of significance. It is, thus, respectfully submitted that the jurors who actually saw and heard the witnesses were quite justified in concluding that Ballwanz, who made no complaints whatever (until he testified quite eloquently in the District Court) really had nothing to complain about.

CONCLUSION

The decision of the Court below is in conflict with its own prior decisions and with decisions in other circuits. It is also in conflict with this Court's decision in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., et al., supra.* It is, therefore, respectfully urged that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

OPINION

(Filed and Entered, June 5 1963)

(Reported at 319 F. 2d 457)

United States Court of Appeals for the Fourth Circuit

No. 8786

William Ballwanz, to the use of Liberty Mutual Insurance Company,

Appellant,

versus

Isthmian Lines, Inc., a body corporate,

Appellee,

and

Isthmian Lines, Inc., a body corporate,

pellant,

versus

Jarka Corporation of Baltimore,

Appellee.

Appeals from the United States District Court for the District of Maryland, at Baltimore.
ROSZEL C. THOMSEN, District Judge

(Argued January 22, 1963. Decided June 5, 1963.)

Before SOBELOFF, Chief Judge, and J. SPENCER BELL, Circuit Judge, and MICHIE, District Judge.

John J. O'Connor, Jr. (O'Connor and Preston on brief) for Appellant, William Ballwanz, to the use of Liberty Mutual Insurance Company; Southgate L. Morison

(Ober, Williams, Grimes & Stirison on brief) for Appellee-Appellant, Isthmian Lines, Inc., and Eugene A. Edgett, Jr., on brief for Appellee, Jarka Corporation of Baltimore.

J. SPENCER BELL, Circuit Judge:

The plaintiff, a longshoreman, one of a gang of eight, was engaged in loading a cargo of truck bodies in the 'tween deck area of The S.S. STEEL WORKER, owned and operated by Isthmian Lines, Inc. The truck bodies were crated in wooden frames measuring between 30 and 35 feet in length, eight feet in width, and four to four and one-half feet in height. To lift them from the pier into the hold, a heavy wire sling was placed under each end of the crate approximately eight feet from the edge. A wooden spreader was placed between the wires of the sling at the top of the crate to prevent the weight of the body exerted on the heavy metal wire from crushing in the crate at the top. The spreaders were four by sixes, eight feet long, and made of oak wood. The ends of the spreaders were notched to prevent the wires from slipping off. When the crates were landed on four by fours placed in the square of the hatch to receive them, the sling would be relieved of its weight and the spreaders would drop down onto the top of the crate. The longshoremen would remove the slack wire cable from the respective ends of the crate and take a half hitch with the wire sling around each end of the spreaders. They did this on instructions relayed to them from up on the deck. The winches would then hoist the wire slings with the spreaders in them out of the hold and proceed to pick up another crate. After this had been done about the third or fourth time, one of the spreaders fell out as the sling was passing up and "dived" back into the hold, striking the plaintiff on the leg, and injuring him. There was no real conflict in the testimony as to how the injury occurred. It was apparent that the wire of the sling was too stiff to hold the wooden spreader securely. The parties' witnesses differed as to the use of this type of spreader on the water front. The plaintiff and his co-

workers all testified that this was the first time they had used a spreader which was not bolted or in some other way affixed to the sling so that it would not fall off. The stevedore foreman testified that this type of spreader was used occasionally. He estimated that in five years this type of spreader had been used perhaps as often as forty times.

The case was submitted to the jury on special issues which were answered as follows:

A. Under all the facts of this case, was the SS STEEL WORKER, at the time and place of the casualty complained of, unseaworthy with respect to the loading gear used at the No. 5 hatch?

Yes No X

B. Under all the facts of this case, was Isthmian Lines, Inc., the Master, or any member of the crew of the SS STEEL WORKER at the time and place of the casualty complained of, negligent?

Yes X No

If your answer to both A and B are "No", it is not necessary to answer the remaining questions.

If your answer to either A or B is "yes", you should answer the remaining questions.

C. If you find unseaworthiness or negligence, or both, existed at the time and place of the casualty complained of, was such unseaworthiness or negligence, or the combination of both, a proximate cause of the injuries sustained by Mr. Ballwanz?

Yes No X

D. Did any negligence of the Plaintiff cause or contribute to the accident of which he complains?

Yes X No

If your answer to D is "No." you need not answer "E". If your answer to D is "Yes" you should answer "E".

E. If you find negligence on the part of Mr. Ballwanz and that such negligence was a proximate

cause of the injuries sustained, to what extent or degree percentagewise, did such negligence contribute to the happening of the casualty?

50%

F. If your answer to either question A or B and your answer to question C were "yes", at what amount do you fix the damages, apart from any question of contributory negligence?

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On the basis of these answers the Court entered judgment for the defendant and the plaintiff appeals.

In the factual context of this case it was error to enter a verdict for the defendant on the basis of the jury's answers to the special issues submitted. On these issues the jury found the ship to be negligent. No evidence submitted to the jury tended to show the vessel negligent except in one particular and that was with reference to the inadequacy of this equipment and the manner of its use. If the ship was negligent, that negligence consisted of its failure to prohibit the inadequate equipment from being used, or if it was being used improperly then to stop such improper use. No other hypothesis or theory than this was advanced by either counsel or Court until after the jury's verdict was returned. We agree with the analysis of the trial judge in this respect. In a colloquy with counsel for the shipowner, who was complaining of the absence in the charge of any instruction concerning the negligence of the stevedore company, who was third party defendant, the Court said:

> ". . . if you (ship owner) were negligent, your negligence operated — your knowledge of the spreader, operated right up to the moment of the time these men had the choice either to do it in a dangerous way, as you say, or to hand it up. I don't think any intervening negligence of Jarka, except the negligence in which the plaintiff himself participated, could be an intervening insulating negligence."

In short, the theory upon which the case was tried was that the injury was caused by the negligence of either the ship owner or the plaintiff or both. If in the context of these facts, the ship owner was negligent, as the jury found, then his negligence could not but have been a proximate cause of the accident. That the plaintiff's negligence contributed 50% to his injury was to be considered in the computation of damages but could not relieve the defendant of his share of the responsibility for the causation of the injury which in fact resulted from the use of this equipment. In fact the jury found both the ship owner and the seaman negligent; but it found that the seaman's negligence contributed only 50% to the happening of the casualty. In the narrow factual setting of this case, we find the conclusion inescapable that these findings are inconsistent with the finding that the ship owner's negligence was not at least a proximate cause of the plaintiff's injury. This inconsistency would not support a judgment for the defendant based upon a speculation that some third person had contributed the remaining 50% of negligence which caused the accident.

In this connection, we also think it was error to charge the jury that they might consider Ballwanz's failure to "pass up" the spreader by hand instead of "slinging it up" as evidence of contributory negligence on his part. The plaintiff longshoreman was at the bottom of the hierarchy of command and we fail to see how he can be held responsible for the manner of operations of the stevedore company. The defendant ship owner had a general responsibility for the manner in which the loading operations on his vessel were carried out. If it was negligent and dangerous to "sling" the spreaders up instead of passing them up, then this manner of operation had been going on under the general supervision of the ship owner and the particular supervision of the stevedore company for nearly three hours before the injury occurred.

While it is true that an effort must be made to reconcile jury verdicts, nothing in the Seventh Amendment removes the appellate court's duty to correct errors of law. *A. & G. Stevedores v. Ellerman Lines*, 369 U.S. 355, 366 (1962)

(dissenting on other grounds). We find, as discussed above, that the jury's answers to the special issues submitted to it was irreconcilable.

We are also of the opinion that the Court erred in its charge to the jury in three respects: first, in defining unseaworthiness, its emphasis upon the necessity of finding fault on the part of the vessel could easily have led the jury to confuse the concept of fault with the common law concept of negligence, and second, the Court in its repetitive insistence that the equipment need be only *reasonably* fit for the purpose for which it was being used grossly de-emphasized the affirmative aspects of the doctrine of seaworthiness as laid down by the Supreme Court. Finally in the factual aspects of this case, it was error to charge the jury that in considering the seaworthiness of the gear they might take into consideration the plaintiff's failure to complain or to demand additional materials to make it better suited to the purpose for which it was being used.

In its charge to the jury the Court emphasized the fact that unseaworthiness cannot occur without fault of the ship owner. However true it may be as an abstract proposition of law that unseaworthiness in a broad general sense cannot exist without fault on somebody's part in that it constitutes a breach of one's duty, it is not a fault in the ordinary everyday use of the term. Certainly no layman would accept as a "fault" many of the conditions which the Court has held to constitute unseaworthiness — by way of illustration, a door knob which comes loose, *The H. A. Scandrett*, 87 F. 2d 708 (2 Cir. 1937); a scaffold which breaks because it is made up with defective rope, when the ship owner has furnished sound rope, *Mahnich v. Southern Steamship Co.*, 321 U.S. 96 (1944); a ladder with a broken rung, *Dixon v. United States*, 219 F. 2d 10 (2 Cir. 1955); grease or oil on deck, *United States v. Harrison*, 245 F. 2d 911 (9 Cir. 1957); a shackle with a hidden defect which broke in use, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); a shower without hand rails, *Krey v. United States*, 123 F. 2d 1008, (2 Cir. 1941); a transitory condition not called to the attention

of the ship owner. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Gryzbowski v. Arrow Barge Co.*, 283 F. 2d 481 (4 Cir. 1960).

The courts have long recognized this difference between the obligations and responsibilities which the ship owner owes to the members of the crew of his vessel as compared to an employer on shore side, *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939). Thus the obligation of seaworthiness is absolute in character and is not satisfied by the exercise of reasonable care on the part of the ship owner, nor is it affected by relinquishment of control to another, such as a stevedore employer of a longshoreman. *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954). Should the jury find unseaworthiness the maritime law would make the defendant liable for any injuries suffered by the plaintiff in this case by reason of the unsafe condition of the loading gear, including the unattached and unsecured wooden spreader, even if the ship owner had no knowledge of the defect and no opportunity to discover it or correct it. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1943); *Read v. United States*, 201 F. 2d 758 (3 Cir. 1953). Thus the Court's emphasis upon the necessity of finding fault, when considered with reference to the balance of the charge, was an unjustifiable dilution of the doctrine of seaworthiness as it has been developed by the Supreme Court.

The above error of the Court was emphasized by its subsequent repetitive insistence that the equipment used need be only *reasonably* fit for the purpose for which it was intended. Thus the Court's statement:

> "It is only obligated to have equipment which is reasonably safe for carrying out the ship's work, and to determine what is reasonably safe equipment for such purposes, the Jury may consider what is customary in the port at the time of the occurrence and may only find such equipment makes a ship unseaworthy if it creates an unreasonable risk to those performing the work."

This emphasis of the "negative" aspects of the duty by its use of the terms "reasonably", "reasonable", and "unreasonable", constantly repeated in defining the nature and extent of the duty, diluted and adulterated the character of the warranty of seaworthiness. Interspersed and repeated as they were throughout that portion of the charge devoted to defining and explaining the doctrine of liability for unseaworthiness, these words and phrases were tantamount to suggesting a requirement that the jury must find negligence in order to hold the ship owner liable, an obviously incorrect standard which might well have confused and misled the jury. We repeat that liability for injury resulting from unseaworthiness is not to be based on concepts of negligence. The cases cited above indicate how slight a defect is sufficient to constitute a breach of this warranty of unseaworthiness.

We also think it error for the Court to have charged the jury in this case that in considering the seaworthiness of the vessel they might take into consideration the plaintiff's failure to complain or to demand additional material to make the equipment better suited for the purpose for which it was being used. In its charge the Court said:

> "In connection with the issue of seaworthiness you may also consider the fact that no complaint was made by the plaintiff or by any of the other members of the gang to the gang carrier or by the gang carrier to the foreman about the spreader, and you may consider that the plaintiff and his fellows did not ask for wire or cord to tie or lash the spreader to the wire sling or cable.
>
> "You should consider the situation of the ship with the main deck and this 'tween deck about seven feet below, and you may consider the fact that the men at the forward end of the crate, instead of sending the spreader up in the way the men at the rear end did, passed it up just by handing it up onto the top deck, which was seven feet above them."

This instruction is strikingly similar to that given by the District Court in *Gryzbowski v. Arrow Barge Co.*, 283 F. 2d 481 (4 Cir. 1960), and held improper by this Court.

It is the ship owner's absolute and nondelegable duty to furnish to seamen and to others to whom that duty is owing a seaworthy vessel. "A longshoreman does not assume the risk of negligence or unseaworthiness and this is so whether the action is based on negligence or unseaworthiness." *Klimaszewski v. Pacific-Atlantic Steamship Co.*, 246 F. 2d 875 (3 Cir. 1957); *Palermo v. Luckenback Steamship Co., Inc.*, 355 U.S. 20 (1957), *modified*, 355 U.S. 910 (1958).

The plaintiff was one of a gang of eight longshoremen working in the hold of the defendant ship. He had no responsibility for, or authority over, any of his fellow workers. His duty was to do his work as he was instructed. He was in no sense obligated to protest against the method of operation which he had been instructed to follow or to devise a safer method, nor was he obligated to call for additional or different equipment. If the doctrine of seaworthiness means anything, it is totally repugnant to the doctrine of assumption of risk on the part of seamen. The plaintiff in this case was at the very bottom of the hierarchy of command, and the effect of the charge was to place too much responsibility upon him for the over-all operations of the stevedore. The courts have held that where a seaman has a choice between a seaworthy or an unseaworthy part of a ship his use of the latter will not relieve the owner of his responsibility. *Palermo v. Luckenback Steamship Co., Inc., supra.* Certainly if a seaman may deliberately choose an unseaworthy part of a ship without losing his right of recovery then he is under no obligation to complain about his orders or to insist on better equipment. Nor do we think that the error was cured by the Court's later reference to the doctrine of assumption of risk in that part of the charge relating to the issue of plaintiff's contributory negligence.

In *Gryzbowski v. Arrow Barge Co.*, 283 F. 2d 481 (4 Cir. 1960) this Court held the District Court in error in charging that the doctrine of unseaworthiness did not extend to transitory unsafe conditions, citing *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). Specifically, it held that the District Court was in error in charging the jury that they might consider on the question of seaworthiness the fact that no one (including the plaintiff) had complained to the ship owner because neither notice of the condition nor lack thereof was material. It also stated "But in determining seaworthiness, no significance attaches to the fact that no one complained of the alleged unsafe condition. Neither notice of the condition or lack thereof was significant." The Court added that such an instruction was in conflict with the Supreme Court's pronouncement that "what is involved is a complete divorcement of unseaworthiness liability from concepts of negligence".

Thus the Court held that the required standard of seaworthiness must be met whether any one complains or not, and to permit a jury to consider the absence of complaints or demands for other or additional equipment is to detract from the standard required. The Court holding that the remainder of the charge set forth a correct exposition of the law cannot be construed as upholding the charge which was given in this case when considered in the context of its facts. Indeed, with the exception of its reference to complaints, no isolated statement of the charge given in this case could be said to be incorrect as a matter of law. It is correct appellate language, but in its overwhelming emphasis on the negative aspects of the doctrine it was well calculated to mislead a jury, and the fact that the jury found the vessel guilty of negligence but the gear to be seaworthy is indicative of that fact.

For the reasons stated herein, the case will be remanded to the District Court with the direction that the plaintiff be awarded a new trial.

Reversed and remanded.

APPENDIX B

JUDGMENT

(Filed and Entered, June 5, 1963)

United States Court of Appeals for the Fourth Circuit

No. 8786

William Ballwanz, to the use of Liberty Mutual Insurance Company,

Appellant,

vs.

Isthmian Lines, Inc., a body corporate,

Appellee,

and

Isthmian Lines, Inc., a body corporate,

Appellant,

vs.

Jarka Corporation of Baltimore,

Appellee.

Appeals from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby reversed; that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, with direction to set aside the verdict and grant a new trial in accordance with the opinion of the Court filed herein; and that the costs on the appeals be paid by Isthmian Lines, Inc., a body corporate.

J SPENCER BELL,
United States Circuit Judge.

June 5, 1963.

APPENDIX C

Order Denying Petition for Rehearing In Banc

(Filed January 8, 1964)

United States Court of Appeals for the Fourth Circuit

No. 8786

William Ballwanz, etc.,

Appellants,

vs.

Isthmian Lines, Inc., etc.,

Appellees.

Upon consideration of the petition by one of the Appellants, Isthmian Lines, Inc., for a rehearing in banc in this case filed on August 2, 1963, it is

Ordered that said petition be, and the same is hereby, denied.

J. Spencer Bell,
United States Circuit Judge.

A true copy.

Teste:

Maurice S. Dean,
Clerk.